KOK PEEK BOON v. AIA BHD

HIGH COURT MALAYA, KUALA LUMPUR
YUSRIN FAIDZ YUSOFF JC
[SUIT NO: WA-22NCC-858-12-2024]
21 JULY 2025

Abstract – *The court is equipped with a discretionary power to cure procedural defects. Such defects that could be regularised pursuant to O. 41 r. 4 of the Rules of Court 2012 include a defect where the deponent had, through miscommunication, averred a fact regarding an event that has yet to take place.*

CIVIL PROCEDURE: *Irregularity – Affidavit – Application to regularise defect in affidavit in support – Deponent had inserted averments regarding event which had yet to take place ('defect') – Whether defect amounted to procedural irregularity curable under O. 41 r. 4 of Rules of Court 2012 ('ROC') – Whether defect mere clerical error – Whether deponent breached O. 41 r. 5 of ROC – Whether defect prejudicial to opposing party*

The defendant was an insurance company, while the plaintiff was the defendant's former insurance agent. Pursuant to an allegation that the plaintiff had participated in a fraudulent scheme involving 'premium financing', the defendant had terminated the plaintiff's contract. The plaintiff commenced an action for damages against the defendant. During the close of the pleadings for the said action on 6 September 2024, the defendant filed its amended defence and counterclaim ('encl. 14'). However, the filing was not allowed by the Registrar on grounds of formatting defects. That had prompted the defendant to refile encl. 14 ('encl. 17') on 18 September 2024. Prior to the refiling, on 15 September 2024, the plaintiff affirmed an affidavit in support to be used in an application to disallow and/or strike out the defendant's encl. 14 ('encl. 19'). The plaintiff subsequently discovered the existence of encl. 17 in the CMS system, thus, inserted new averments concerning the filing of encl. 17 into encl. 19, an event which took place three days after the affirmation of encl. 19 ('defect'). Supported by encl. 19, the plaintiff then commenced the application to disallow and/or strike out encl. 14 and/or encl. 17 ('encl. 18'). Having realised about the defect in encl. 19, the plaintiff filed the present application for leave to regularise the defect, pursuant to O. 41 r. 4 of the Rules of Court 2012 ('ROC') ('encl. 25'). In support of encl. 25, the plaintiff contended that: (i) the defect was a genuine clerical mistake, and not a deliberate attempt to mislead the court; (ii) the irregularity in encl. 19 was technical and did not prejudice the defendant; and (iii) pursuant to O. 41 r. 4, O. 1A and O. 2 r. 1(3) of the ROC, the court was equipped with the discretionary power, where necessary, to serve the ends of justice, to cure procedural defects. Meanwhile, in resisting

encl. 25, the defendant had posited that: (i) the defect was not a mere procedural lapse but a fundamental defect going to the substance of encl. 19. The plaintiff's attestation to an event which had not yet occurred at the time of the affirmation had undermined the very credibility and integrity of encl. 19; (ii) the defect clearly amounted to a breach of O. 41 r. 5 of the ROC, which requires affidavits to only contain facts within the deponent's personal knowledge; and (iii) a defect going to the substance of an affidavit could not be remedied through the curative provisions of O. 41 r. 4 of the ROC. The sole issue that arose in encl. 25 was whether the defect in encl. 19 amounted to a mere irregularity that could be cured under O. 41 r. 4 of the ROC.

Held (allowing encl. 25 with costs):

(1) The irregularity in encl. 19 amounted to a procedural lapse rather than a substantive defect. The inclusion of information about events occurring after the affidavit's affirmation clearly resulted from an administrative oversight rather than any intent to deceive. The plaintiff had offered a reasonable explanation for this error, which was a miscommunication with a temporary clerk, and had acted swiftly to rectify the situation by filing encl. 25. The issue with encl. 19 did not constitute a breach of O. 41 r. 5 of the ROC. Instead, it involved an addition or alteration to an affidavit which fell within the ambit of O. 41 r. 7 of the ROC, which is generally curable by having the affidavit re-sworn. (paras 13-15)

(2) The factual reference to the filing of encl. 17 was not disputed and had no bearing on the substantive merits of the plaintiff's case. This could be contrasted to situations involving deliberately giving false or misleading statements in affidavits. The mistake herein was purely clerical in nature. Further, the defendant's claim of prejudice remains unsubstantiated, particularly given the undisputed nature of fact in question and the plaintiff's offer to remedy the defect. This approach aligned with the well-established judicial principle that parties should not suffer unduly for their lawyer's honest mistakes. (paras 17 & 19)

(3) There was a degree of inconsistency in the defendant's strict reliance on procedural technicalities, particularly considering their own procedural missteps. The defendant's encls. 14 and 17 had been filed outside the prescribed timeline and without the requisite leave under O. 20 r. 5 of the ROC. The defendant's failure to promptly serve encl. 17 gave rise to an understandably reactive insertion of related facts into encl. 19 after its affirmation. In any event, encl. 18 had made it plain that the plaintiff was intended to challenge the validity of encls. 14 and 17. As such, although encl. 18 was contested, it was in substance an interlocutory application that concerned with procedural compliance rather than final adjudication of rights. Enclosure 19, although irregular in sequence, caused no prejudice to the defendant and was related to a matter that was clearly capable of being regularised. (paras 20 & 21)

(4) Although encl. 19 referred to an event that had not occurred at the time of its affirmation, that event was now both certain and undisputed. To disallow the affidavit solely on this technical ground would permit procedural form to eclipse substantial justice. Enclosure 25 was therefore allowed by having encl. 19 re-sworn. Costs of RM2,000 was also ordered to be paid by the plaintiff to the defendant. (paras 22 & 23)

Case(s) referred to:

Doyle v. Olby (Ironmongers) Ltd [1969] 2 QB 158 ***(refd)***
Gilbert Engineering Co Inc v. Zainuddin Ahmad & Ors (No 2) [2003] 3 CLJ 39 HC ***(refd)***
Kordial Kor Kundang Singh v. EC Controlled Demolition Sdn Bhd & Ors [2002] 6 CLJ 295 HC ***(refd)***
Redang Paradise Vacation Sdn Bhd v. Yap Chuan Bin & Other Appeals [2017] 10 CLJ 296 CA ***(refd)***
Yii Tue Yieng v. Lim Wai Keong [2023] CLJU 351; [2023] 1 LNS 351 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 1A, O. 2 r. 1(3), O. 20 rr. 3(2)(b), 4, 5, O. 41 rr. 4, 5, 7

For the plaintiff - Lim Pang Kiat & Fung Yu Qi; M/s Pang Kiat, Yu Qi Law Chambers
For the defendant - Louise Jacqueline Azmi & Latifa Haiqa Yusoff; M/s Skrine

Reported by Syamim Ariffin

JUDGMENT

Yusrin Faidz Yusoff JC:

[1] Like a scene lifted from Steven Spielberg's Minority Report, where fate is sealed by precogs' premonitory glimpses of a future not yet lived, this case turns on an affidavit that appears to defy time itself. The plaintiff now seeks leave under O. 41 r. 4 of the Rules of Court 2012 ("the Rules") to regularise this temporal anomaly by reaffirming the affidavit. The impugned paragraph refers to an event that took place three days after the affidavit was affirmed, as if the deponent had peered into the future. The defendant objects strenuously, insisting the defect is no mere slip but a fatal flaw that strikes at the heart of admissibility. After careful scrutiny of the submissions and authorities, this court grants the plaintiff's application, for the reasons that follow.

Background Facts

[2] The material facts are largely undisputed. The plaintiff, a former insurance agent of the defendant, claims wrongful termination and seeks damages exceeding RM322 million. The defendant terminated her contract alleging participation in a fraudulent scheme involving "premium financing", namely, the practice of paying insurance premiums on behalf of policy holders, often using third-party funds, to generate policies that may

later lapse, allowing agents to earn commissions without any genuine intention of maintaining the coverage. The plaintiff, however, denies these allegations and asserts that her termination was actuated by ulterior motives.

[3] The procedural history unfolds as follows:

(i) on 3 July 2024, the plaintiff initiated the action by filing the writ and statement of claim (encls. 1 and 2);

(ii) the defendant responded on 9 August 2024 with their defence and counterclaim (encl. 5);

(iii) on 22 August 2024, the plaintiff filed an amended writ and statement of claim pursuant to O. 20 rr. 1 and 3 of the Rules (encls. 8 and 9). The amendments were confined to correcting the name of the first plaintiff and updating the plaintiff's solicitor's particulars. However, the Registrar rejected these documents on 23 August 2024 due to formatting non-compliance;

(iv) on 23 August 2024, the plaintiff filed their reply to defence and defence to counterclaim (encl. 11);

(v) on 26 August 2024, the plaintiff refiled the amended writ and statement of claim under the same provisions (encls. 12 and 13);

(vi) pleadings were deemed closed on 6 September 2024;

(vii) on 6 September 2024 at 11:58 pm, the defendant filed an amended defence and counterclaim (encl. 14) pursuant to O. 20 r. 3(2)(b). The amendments were substantial, replacing the original 37 paragraphs in encl. 5 with a newly drafted 56-paragraph pleading. This filing was rejected by the Registrar on 9 September 2024 due to formatting defects;

(viii) on 18 September 2024, the defendant refiled the amended pleading, now marked as encl. 17;

(ix) prior to that, on 15 September 2024, the plaintiff had affirmed an affidavit in support intended to be used in an application to disallow and/or strike out the defendant's amended defence and counterclaim in encl. 14;

(x) the plaintiff subsequently discovered the existence of encl. 17 during a routine check of the CMS system. At the material time, encl. 17 had not been served on the plaintiff. As a result, the plaintiff added new averments concerning encl. 17 into the affidavit that had already been affirmed on 15 September 2024;

(xi) on 20 September 2024, the plaintiff filed an application under O. 20 r. 4 (encl. 18) to disallow or strike out the defendant's amended defence and counterclaim (encls. 14 and/or 17);

(xii) the application in encl. 18 is supported by the affidavit in support (encl. 19), affirmed on 15 September 2024. As indicated above, the affidavit includes a factual assertion regarding the filing of encl. 17, an event which occurred three days later;

(xiii) on 8 October 2024, the defendant filed an application (encl. 21) seeking an extension of time and leave to regularise their amended defence and counterclaim; and

(xiv) on 13 October 2024, the plaintiff filed the present application (encl. 25) to regularise the affidavit in support (encl. 19) on grounds that it contained reference to a post-affirmation event.

[4] At their core, these interlocutory applications stemmed from the defendant's belated and procedurally defective attempts to amend their pleadings. After carefully evaluating the parties' submissions, I rendered the following decisions on 6 May 2025:

(i) the plaintiffs application in encl. 25 to regularise the affidavit in support (encl. 19) was allowed, with costs of RM2,000 payable by the plaintiff to the defendant; and

(ii) following the defendant's solicitors' indication of their intention to file an application for a stay of proceedings to preserve the *status quo* pending appeal, the hearings for encls. 18 and 21, which had been fixed for the same date, were vacated and adjourned for case management on 27 May 2025.

Issue

[5] The sole issue in respect of encl. 25 is whether the defect in the plaintiff's affidavit in encl. 19 amounts to a mere irregularity that may be cured under O. 41 r. 4 of the Rules.

Counsels' Contentions

Defendant's Contentions

[6] Learned counsel for the defendant, Louise Jacqueline Azmi, mounted a strong opposition to the plaintiff's application in encl. 25. She contended that the error in the affidavit was not a mere procedural lapse but a fundamental defect going to its substance. The crux of the defendant's argument was that the plaintiff's attestation to events which had not yet occurred at the time of affirmation undermined the very credibility and integrity of the affidavit.

[7] Counsel underscored that the irregularity pointed to one of two troubling possibilities: either the plaintiff had improperly affirmed a blank affidavit, or the affidavit was altered without authority after it had been affirmed. In either case, such conduct would amount to a clear breach of

A O. 41 r. 5 of the Rules, which requires that affidavits contain only facts within the deponent's personal knowledge. Order 41 r. 5 is reproduced below:

> Contents of affidavit (O. 41 r. 5)
>
> B 5. (1) Subject to Order 14, rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38, rule 3, **an affidavit may contain only such facts as the deponent is able of his own knowledge to prove**.
> (emphasis added)

[8] Since the affidavit was affirmed on 15 September 2024, and encl. 17 C was only filed on 18 September 2024, it was, in counsel's submission, not possible for the plaintiff to have known of its existence at the time of affirmation.

[9] In advancing this position, learned counsel for the defendant relied upon *Kordial Kor Kundang Singh v. EC Controlled Demolition Sdn Bhd* D *& Ors* [2002] 6 CLJ 295; [2002] 7 MLJ 386 per Abdul Malik Ishak J (as His Lordship then was) and *Gilbert Engineering Co Inc v. Zainuddin Ahmad & Ors (No 2)* [2003] 3 CLJ 39; [2003] 6 MLJ 103 per Vincent Ng J (as His Lordship then was), which firmly establish the principle that defects going to the substance of an affidavit cannot be remedied through the curative E provisions of O. 41 r. 4. The defendant's submissions culminated in a compelling policy argument, cautioning that to grant indulgence in such circumstances would set a dangerous precedent. It could invite abuse of the court's processes and erode the sanctity of sworn testimony.

Plaintiff's Contentions

F **[10]** Learned counsel for the plaintiff, Lim Pang Kiat argues that the defect was a genuine clerical mistake, not a deliberate attempt to mislead the court. The error was promptly admitted *via* a statutory declaration dated 9 October 2024 made by the said temporary clerk, and corrective steps were taken by filing the application to regularise the defect. Dilating on the issue, G learned counsel for the plaintiff argues that the irregularity was technical and did not prejudice the defendant, as the fact averred *ie*, the filing of encl. 17 (re-filing of amended defence and counterclaim), was undisputed.

[11] Counsel submits that this court retains a discretionary power under O. 41 r. 4, O. 1 A, and O. 2 r. 1(3) of the Rules to cure procedural defects, H where necessary to serve the ends of justice authorities such as *Yii Tue Yieng v. Lim Wai Keong* [2023] CLJU 351; [2023] 1 LNS 351 per Duncan Sikodol J and *Redang Paradise Vacation Sdn Bhd v. Yap Chuan Bin & Other Appeals* [2017] 10 CLJ 296 per Hamid Sultan Abu Backer JCA, is argued to support the proposition that courts should prioritize substantive justice over I technical objections, particularly where no prejudice is shown.

Court's Findings

[12] With regards to the discretion to be applied, the court is guided by O. 1 A, O. 2 r. 1 and O. 41 r. 4 of the Rules, all of which provides as follows:

> Regard shall be to justice (O. 1A)
>
> In administering these Rules, the Court or a Judge *shall have regard to the overriding interest of justice and not only to the technical non-compliance* with these Rules.
>
> Non-compliance with Rules (O. 2 r. 1)
>
> 1. (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been non-compliance with the requirement of these Rules, the *non-compliance shall be treated as an irregularity and shall not nullify the proceedings*, any step taken in the proceedings, or any document, judgment or order therein.
>
> *Use of defective affidavit (O. 41 r. 4)*
>
> 4. An affidavit may, with the leave of the Court, be filed or used in evidence *notwithstanding any irregularity in the form thereof.*
>
> (emphasis added)

[13] Having considered the affidavit evidence and the submissions of learned counsel on both sides, the court is of the view that the irregularity in the plaintiff's affidavit amounts to a procedural lapse rather than a substantive defect. Of particular relevance is the statutory declaration affirmed by the plaintiff's temporary clerk, which the court finds to be candid and persuasive (see exh. A-1 of encl. 26). The pertinent extract of the statutory declaration is set out below:

> ...
>
> 1. Saya adalah seorang kerani sementara kepada Tetuan YuQi & Associates yang beramaldi No. 1, Jalan Bawal Satu, Taman Seri Paya, 86000 Kluang, Johor.
>
> 2. Pada 08.10.2024, saya telah ditunjuk oleh majikan saya tiga (3) affidavit secara khusus-nya perenggan 9 di dalam-nya seperti berikut:
>
> (a) *Afidavit Sokongan diikrarkan oleh Kok Peek Boon pada 15.09.2024 (Lampiran 19)* di bawah kes WA-22NCvC-429-07/2024.
>
> (b) Afidavit Sokongan diikrarkan oleh Lee Kar Yun pada 15.09.2024 (Lampiran 19) di bawah kes WA- 22NCvC-431-07/2024.
>
> (c) Afidavit Sokongan diikrarkan oleh Shum Ching Joo pada 15.09.2024 (Lampiran 19) di bawah kes WA- 22NCvC-433-07/2024.
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> 3. Saya mengakui bahawa *saya telah pada 19.09.2024 tersalah faham akan arahan majikan saya untuk membuatsuatu "afidavit tambahan" dengan "tambahan kepada afidavit" dan secara tersilap menggantikan Perenggan 9 dengan*

A *memasukkan fakta-fakta pemfailan Lampiran 17 oleh Defendan-defendan pada 18.09.2024 tanpa kesedaran kesan ke atas afidavit-afidavit tersebut yang telah diikrarkan pada 15.09.2024, sebelum pemfailan-nya pada 20.09.2024.*

4. Saya amat kesal terhadap kesilapan perkeranian tersebut dan dengan ini dengan rendah diri memohon ribuan maaf ke atas-nya yang tidak
B disengajakan dan segala kesulitan amat dikesali. ...

(emphasis added)

[14] The inclusion of information about events occurring after the affidavit's affirmation clearly resulted from an administrative oversight rather than any intent to deceive. The plaintiff's solicitors have offered a
C reasonable explanation for this error, a miscommunication with a temporary clerk, and have acted swiftly to rectify the situation by filing encl. 25.

[15] The court is of the view that the issue with the affidavit does not constitute a breach of O. 41 r. 5, which requires that affidavits be confined to matters within the deponent's personal knowledge. Instead, it involves an
D addition or alteration to the affidavit falling within the ambit of O. 41 r. 7, which is generally curable by having the affidavit re-sworn before it is filed. Order 41 r. 7 is reproduced below:

Alterations in affidavits (O. 41 r. 7)

E 7. (1) *An affidavit which has* in the jurat or body thereof any interlineation, erasure or *other alteration shall not be filed or used in any proceeding without the leave of the Court* unless the person before whom the affidavit was sworn has initialled the alteration and, in the case of an erasure, has re-written in the margin of the affidavit any words or figures written on the erasure and has signed or initialled them.

F (2) *An alteration shall not be made in any affidavit after it has been filed, but, before an affidavit is filed alterations may be made therein and the affidavit shall be resworn with a further jurat commencing with the word "re-sworn" added.*

(emphasis added)

[16] In the circumstances, upon receiving instructions from the solicitors,
G the plaintiff's temporary clerk should have either prepared a supplementary affidavit or arrange for the deponent to attend before a Commissioner for Oaths to have the defective affidavit re-sworn.

[17] Importantly, the factual reference to the filing of encl. 17 was not disputed between the parties and had no bearing on the substantive merits of
H the plaintiff's case. This stands in contrast to situations involving deliberately false or misleading statements in affidavits. Here, I am of the considered view that the mistake was purely clerical in nature.

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[18] While the defendant has cited authorities dealing with deliberate falsifications, these are distinguishable from the present case where the error was clearly inadvertent. The court is guided by O. 1A's directive to prioritise substantive justice over technical compliance, as held by Hamid Sultan Abu Backer JCA in *Redang Paradise Vacation Sdn Bhd v. Yap Chuan Bin & Other Appeals* (*supra*):

> [6] In the light of O. 1A and O. 2 of RC 2012, *it is not an option anymore for the courts to strike out a matter for non-compliance of the rules without giving an opportunity to the litigant to regularise the proceedings or to condone the irregularity by the fiat of the court*. It is only in extremely rare cases where the non-compliance cannot be condoned at all, the court will be obliged to strike out the matter. Those are the cases where the respondent can demonstrate prejudice as well as can establish that the breach cannot be compensated by costs.
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> (emphasis added)

[19] The defendant's claim of prejudice remains unsubstantiated, particularly given the undisputed nature of the fact in question and the plaintiff's offer to remedy the defect. This approach aligns with the well-established judicial principle that parties should not suffer unduly for their lawyers' honest mistakes, as articulated by Lord Denning in *Doyle v. Olby (Ironmongers) Ltd* [1969] 2 QB 158 (CA) at para. 11:

> ... **We never allow a client to suffer for the mistake of his Counsel if we can possibly help it**. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side ...
>
> (emphasis added)

[20] The court further notes a degree of inconsistency in the defendant's strict reliance on procedural technicalities, particularly in light of their own procedural missteps. At all material times, their amended defence and counterclaim was filed outside the prescribed timeline and without the requisite leave under O. 20 r. 5 of the Rules. The defendant's failure to promptly serve encl. 17 gave rise to an understandably reactive insertion of related facts into the plaintiff's affidavit in support of encl. 18 after its affirmation. In any event, the notice of application in encl. 18, for its part, makes plain that the plaintiff intended to challenge the validity of both encls. 14 and 17.

[21] In this light, encl. 18, though contested, is in substance an interlocutory application that concerns procedural compliance rather than the final adjudication of rights. The impugned affidavit, though irregular in sequence, causes no prejudice to the defendant and relates to a matter that is clearly capable of being regularised.

A **[22]** What the defendant characterises as a fatal temporal contradiction is more accurately understood through the concept of a bootstrap paradox or causal loop, as discussed by Novikov in *Evolution of the Universe* (1983), where an effect appears to precede its cause but still produces a coherent and consistent outcome. From the vantage point of a notional time traveller, what
B appears to be a temporal contradiction dissolves into an inevitable causal loop. On this footing, the court is of the view that although the affidavit refers to an event that had not occurred at the time of affirmation, that event is now both certain and undisputed. To disallow the affidavit solely on this technical ground would permit procedural form to eclipse substantive justice.

C **Decision**

[23] For the reasons outlined above, the plaintiff's application in encl. 25 to regularise the affidavit in support (encl. 19) is allowed by having the said affidavit re-sworn. Costs of RM2,000 to be paid by the plaintiff to the defendant.

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